In the Supreme Court of the United States

October Term, 1976
No. 76-1660

TERRELL DON HUTTO, Sub Nom, JAMES MABRY, Commissioner, Arkansas Department of Correction, et al.,

Petitioners

v.

ROBERT FINNEY, et al.,

Respondents

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF OF THE COMMONWEALTH OF PENNSYLVANIA, AMICUS CURIAE

MELVIN R. SHUSTER
Deputy Attorney General
J. JUSTIN BLEWITT, JR.
Deputy Attorney General
Chief, Civil Litigation
ROBERT P. KANE
Attorney General
Attorneys for Commonwealth of Pennsylvania, Amicus Curiae

Department of Justice
Capitol Annex Building
Harrisburg, PA 17120
717—787-5093

Murrelle Printing Co., Law Printers, Box 100, Sayre, Pa. 18840

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES:

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1976
No. 76-1660

TERRELL DON HUTTO, Sub Nom, JAMES MABRY, Commissioner, Arkansas Department of Correction, et al.,

Petitioners

v.

ROBERT FINNEY, et al.,

Respondents

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF OF THE COMMONWEALTH OF PENNSYLVANIA, AMICUS CURIAE

INTEREST OF AMICUS

The Commonwealth of Pennsylvania submits this brief *amicus curiae* in support of the proposition advanced by the State of Arkansas that the Eleventh Amendment bars an award of attorney's fees against the state under either the Civil Rights Attorney's Fees

Awards Act of 1976 or the "bad faith" exception to the "American Rule" precluding fee awards. This question is of direct and substantial interest to the Commonwealth, which must defend numerous civil rights actions under 42 U.S.C. §1983 brought against both the Commonwealth and its officials. In such suits, the issue of the award of attorney's fees is a constantly recurring one.

In recent years, the number of civil rights actions filed in federal courts against state officials has radically increased. If successful litigants may recover awards of attorney's fees in such cases, the Commonwealth will be required to expend a portion of its already overburdened financial resources in the satisfaction of such claims. This prospect threatens a substantial invasion of the Commonwealth treasury which is unnecessary to the vindication of federal rights. Accordingly, we join the State of Arkansas in urging this Court to reverse the decision below affirming an award of attorney's fees payable with state funds.

SUMMARY OF ARGUMENT

In adopting the Civil Rights Attorney's Fees Awards Act of 1976, Congress did not broaden the substantive causes of action in which successful litigants may receive an award of attorney's fees. As a result, the Eleventh Amendment remains a bar to an award of attorney's fees against the state. The legislative history accompanying the Act erroneously interprets recent decisions of this Court, so that regardless of its intent, Congress failed to subject the states to fee awards in civil rights cases.

Even if the Attorney's Fees Act is applicable to the states, it should not be applied retroactively to pending cases. Placing such a heavy and unforeseen burden on the states and individual defendants would result in manifest injustice to litigants who have properly relied upon the long-standing immunity afforded by the Eleventh Amendment.

Alternatively, an award of attorney's fees predicated upon the state's "bad faith" is similarly unsupportable. Fees awarded on this basis are essentially punitive in nature and not necessary to insure compliance with federal law prospectively. Finally, this Court's decision in *Fairmont Creamery Co. v. Minnesota*, 275 U.S. 70 (1927), awarding costs against a state, is not controlling on the question of attorney's fees.

ARGUMENT

I. THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976 IS NOT APPLICABLE TO THIS CASE

A. The Eleventh Amendment to the United States Constitution Bars the Application of the Attorney's Fees Act to the States

The Civil Rights Attorney's Fees Awards Act of 1976,[1] which was signed into law on October 16, 1976, provides:

> "Be it enacted:
>
> That the Revised Statutes section 722 (42 U.S.C. §1988) is amended by adding the following: 'In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980 and 1981 of the Revised Statutes, Title IX of Public Law 93-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or Title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.' "

[1] Pub. L. 94-559, 42 U.S.C. §1988 as amended (hereinafter Attorney's Fees Act).

Although respondents brought this action pursuant to 42 U.S.C. §1983,[2] which provides redress for the deprivation under color of state law of rights, privileges and immunities secured by the Constitution and laws of the United States, application of the Attorney's Fees Act is precluded by the operation of the Eleventh Amendment.[3] The settled and unassailable interpretation of Section 1983 is that neither a state nor any of its agencies is a "person" within the meaning of that statutory provision. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); *Edelman v. Jordan*, 415 U.S. 651 (1974); *U.S. ex rel. Gittlemacker v. Comm. of Pa.*, 281 F. Supp. 175 (E.D. Pa. 1968), *aff'd* 413 F.2d 84 (3rd Cir. 1969), *cert. denied* 396 U.S. 1046 (1970).

The court of appeals below affirmed an award of attorney's fees "to be paid out of the funds allocated to the Department of Correction." *Finney v. Hutto*, 548 F.2d 740, 742 (8th Cir. 1977). However, in providing for an award of attorney's fees in civil rights actions by its adoption of the Attorney's Fees Act, Congress did not broaden the substantive causes of action in which such an award could be made. Consequently, the State of Arkansas, along with every state, remains immune under the Eleventh Amendment from an award of Attorney's fees against it, notwithstanding

[2] R.S. §1979.

[3] The Eleventh Amendment provides:

> "The judicial power of the United States shall not extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

the legislative history accompanying the Attorney's Fees Act to the contrary.

The Report of the House of Representatives Committee on the Judiciary, H.R. Rep. No. 94-1588, 94th Congress, 2nd Session (hereinafter House Report), at 7, concluded that governmental officials, who frequently are defendants in civil rights actions:

> ". . . have substantial resources available to them through funds in the common treasury including taxes paid by the plaintiffs themselves. . . . The greater resources available to governments provide an ample base from which fees can be awarded to the prevailing plaintiff in suits against governmental officials or entities."

Without any extended analysis, the Judiciary Committee simply relied upon this Court's decision in *Fitzpatrick v. Bitzer, supra,* in concluding: "Of course, the 11th Amendment is not a bar to the awarding of counsel fees against state governments." House Report, at 7, n.14. However, the Judiciary Committee misinterpreted the impact of the Court's decision in *Fitzpatrick* upon Congress' power to abrogate the Eleventh Amendment.

In *Fitzpatrick,* this Court authorized the award of back pay in the form of past retirement benefits as money damages in a suit brought against the State of Connecticut pursuant to Title VII of the Civil Rights Act of 1964. However, Title VII had been expressly amended to subject governments, government agencies and political subdivisions to suit for violations of Title VII. The Court distinguished its prior decision in

Edelman v. Jordan, supra,[4] in which a retroactive award of damages had been denied because 42 U.S.C. §1983 does not contain any congressional authorization to join a state as defendant:

> "Our analysis begins where Edelman ended, for in this Title VII case the *'threshold fact of congressional authorization,'* 415 U.S. at 672, 94 S.Ct. at 1360, *to sue the State as employer is clearly present." Fitzpatrick v. Bitzer, supra,* at 452. (Emphasis supplied.)

The existence of such authorization, exercised pursuant to Congress' authority under Section 5 of the Fourteenth Amendment, was held by the Court to overcome the Eleventh Amendment defense asserted by the state in *Fitzpatrick*:

> "We think that Congress may, in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts."

Thus, while Congress *could have* subjected the states to awards of damages and attorney's fees in actions

---

[4] In *Edelman,* recipients of benefits from federal-state programs of Aid to Aged, Blind and Disabled (AABD) brought a class action for declaratory and injunctive relief to bring about the timely processing of benefits and to recover retroactively payments wrongfully withheld. The Court affirmed the lower court's award of prospective injunctive relief, but reversed the affirmance by the court of appeals of the district court's order requiring the payment of retroactive benefits.

brought under 42 U.S.C. §1983, it did not do so, given the language of the Attorney's Fees Act. Rather, Congress simply rendered those "persons" already liable under the specified Civil Rights Act provisions liable for attorney's fees as well.

The Report of the Senate Judiciary Committee, S. Rep. No. 94-1011, June 29, 1976 (hereinafter Senate Report), exhibits a similar misconception as to the constitutional scope of the Attorney's Fee Act. As did the House Report, the Senate Report concluded that attorney's fees "will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party)." Senate Report, at 5. Since the Senate Report was prepared prior to this Court's decision in *Fitzpatrick v. Bitzer, supra,* the Senate Judiciary Committee couched its rationale in terms adopted from *Edelman v. Jordan, supra,* justifying the fee awards as "ancillary and incident to securing compliance with these laws" and "an integral part of the remedies necessary to obtain such compliance." Senate Report, at 5.

The Senate Judiciary Committee misinterpreted the language in *Edelman* which recognized that the expenditure of money from the state treasury by state officials in order to comply with the mandate of judicial injunctive decrees constitutes a permissible "ancillary effect on the state treasury." 415 U.S. at 668, 94 S.Ct. at 1358. Indeed, the Court rejected the concept of "equitable restitution" as a basis for granting a retroactive award of monetary relief, recognizing that such

recovery would undoubtedly be paid from state funds and would, therefore, be tantamount to an award of damages against the state.

The context of the "ancillary effect" language in the *Edelman* opinion establishes that the Court's focus was limited to the expenditure of state funds necessary for compliance with whatever injunctive relief that was afforded. Referring to prior Supreme Court decisions,[5] the effects of which were to increase future welfare benefits paid from state treasuries, the Court explained:

> "But the fiscal consequences to state treasuries in these cases were the necessary result of compliance with decrees which by their terms were prospective in nature. State officials, in order to shape their official conduct to the mandate of the Court's decrees, would more likely have to spend money from the state treasury then if they had been left free to pursue their previous course of conduct. *Such an ancillary effect on the State treasury is a permissible and often inevitable consequence of the principle announced in Ex Parte Young, supra.*" 415 U.S. at 668. (Emphasis supplied.)

Unlike the "ancillary effect" occasioned by prospective injunctive relief, the award of attorney's fees is more analogous to a recovery of damages for breach of a legal duty.

To hold otherwise would be to ignore the continued vitality of *Ex Parte Young,* 209 U.S. 123 (1908),

---

[5] *See, Graham v. Richardson,* 403 U.S. 365 (1971); *Goldberg v. Kelly,* 397 U.S. 254 (1970).

which has been viewed as "the culmination of this Court's efforts to harmonize the principles of the Eleventh Amendment with the effective supremacy of rights and powers secured elsewhere in the Constitution." *Perez v. Ledesma,* 401 U.S. 82, 106 (1971) (Brennan, J., concurring in part and dissenting in part).

In *Ex Parte Young, supra,* several railroads and their shareholders alleged the unconstitutionality under the Fourteenth Amendment of certain railroad rates, and sought and obtained in Federal court an injunction against the Attorney General of Minnesota restraining him from enforcing as against them penalties specified in the state act under challenge. The Attorney General claimed the Eleventh Amendment deprived the federal court of issuing such an order, and went ahead to enforce the criminal sanctions of the state act.

Upholding the lower court's power to restrain the Attorney General's actions and the subsequent action for contempt, this Court held:

> "If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or his representative character and is subjected in his person to the consequences of his individual conduct. The state has no power to impart to him any immunity from responsibility to *the Supreme authority of the United States.*" 209 U.S. at 159-60. (Emphasis supplied.)

In order to vindicate Constitutional law and overcome the Eleventh Amendment proscription against suits brought against the state, it was necessary for the Court to remove the mantle of sovereign immunity from the actions of state officials by creating the fiction that such actions represented breaches performed in an individual, not official, capacity. Such a theory had precedential support extending from *Osburn v. United States Bank,* 22 U.S. 738 (1824); *Davis v. Gray,* 16 Wall 203 (1872); and *Poindexter v. Greenhow,* 114 U.S. 270, 5 S.Ct. 903 (1855).

However, the Court also took cognizance in *Ex Parte Young* of those cases in which actions nominally brought against state officials to enforce the performance of contracts with the state actually constituted suits against the state itself, because if relief were allowed the state treasury itself would be directly affected. *Hagood v. Southern,* 117 U.S. 52 (1886); *In re Ayers,* 123 U.S. 443 (1887). The Court in *Edelman* specifically alluded to *Hagood* and *Ayers* to "demonstrate that equitable relief may be barred by the Eleventh Amendment." 415 U.S. at 667. Accordingly, the scope of the Court's decision in *Ex Parte Young* cannot be construed to have sanctioned federal jurisdiction to hear suits the result of which would be to effect recovery of funds from the state treasury. Rather, the thrust of *Ex Parte Young* was to insure the compliance of state officials with the supremacy of federal law and not to require the expenditure of state funds and thereby encroach upon a fundamental attribute of state sovereignty—its fiscal integrity.

Thus, the rule recognized by the Court's decision in *Edelman* is that when private parties seek to impose a

liability which must be paid from public funds in the state treasury, the Eleventh Amendment is a bar to such suit. Citing *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945), the Court concluded that, absent waiver by the state, the actual source of the funds to be recovered is determinative of the invocation of this defense:

> "[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantive party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants. *Id.* at 464." 415 U.S. at 663.

Applying this analysis to the question of awarding attorney's fees under the Attorney's Fees Act, when a court enjoins a state official acting in his official capacity from further violating a plaintiff's constitutional right, the absence of personal liability in the official's individual capacity[6] dictates that any fee award could only run against the state. However, because the state is not a "person" under 42 U.S.C. §1983, the plaintiff cannot be deemed to have prevailed against the state. More importantly, the court lacks jurisdiction over the state or any of its agencies for the purpose of entering an award of attorney's fees against

[6] Only where a plaintiff could establish individual liability on the part of a state official could the official himself be subject to paying the attorney's fees. Otherwise, the policies inherent in the concept of official immunity would undeniably be forsaken, which clearly was not Congress' intent. *See, Pierson v. Ray*, 386 U.S. 547 (1967); *Scheuer v. Rhodes*, 416 U.S. 232 (1974); *Wood v. Strickland*, 420 U.S. 308 (1975).

them. *Fitzpatrick v. Bitzer, supra; Edelman v. Jordan, supra.* The parenthetical clause in the Senate Report, *supra* at 5, expressing the intention that the state treasury would be the source of fee awards "whether or not the agency or government is a named party" further demonstrates Congress' erroneous interpretation of this Court's controlling decisions and of all known concepts of jurisprudence.

Whatever its intent, Congress has not, by the express language of the Attorney's Fees Act, subjected the states to liability for attorney's fees. The legislative history summarily relied upon by the court below and by other courts which have awarded fees under the new act[7] has been shown above to misinterpret the relevant Supreme Court cases. As this Court observed in *Edelman v. Jordan, supra* at 676-77, "it has not heretofore been suggested that §1983 was intended to create a waiver of a State's Eleventh Amendment immunity merely because an action could be brought under that section against state officers, rather than against the State itself." In the absence of explicit statutory language subjecting the states to liability for damages and attorney's fees, the Court should be reluctant to find an implicit waiver of the states' immunity from suit under the Eleventh Amendment. *See,*

[7] *See, e.g., Bond v. Stanton*, 555 F.2d 172 (7th Cir. 1977), petition for writ of certiorari filed August 18, 1977; *Rainey v. Jackson State College*, 551 F.2d 672 (5th Cir. 1977); *Stanford Daily v. Zurcher*, 550 F.2d 468 (9th Cir. 1977); *cert. granted* October 3, 1977; *Commonwealth of Pennsylvania v. O'Neill*, 431 F. Supp. 700 (E.D. Pa. 1977); *Wade v. Mississippi Cooperative Extension Service*, 424 F. Supp. 1242 (N.D. Miss. 1976).

Employees of Department of Health & Welfare v. Missouri, 411 U.S. 279 (1973).

Precisely this analysis was employed by the district court in *Skehan v. Board of Trustees of Bloomsburg State College*, 436 F. Supp. 657 (M.D. Pa. 1977), which recognized Congress' power under the Fourteenth Amendment to limit the application of the Eleventh Amendment, *Fitzpatrick v. Bitzer, supra*, but also underscored its failure to do so explicitly in the Attorney's Fees Act:

> "But the Civil Rights Attorney's Fees Awards Act contains no language expressly allowing the recovery of attorney's fees from the states. . . . In the absence of explicit statutory language subjecting the states to liability for damages and attorney's fees, this Court will not imply a limit to the state's immunity to suit under the Eleventh Amendment. *See*, Employees of the Department of Health and Welfare v. Missouri, 411 U.S. 279 (1973)." 436 F. Supp. at 666, 667.

Accordingly, the award of attorney's fees against the Arkansas Department of Corrections should be reversed because Congress has failed to define the term "person" as used in 42 U.S.C. §1983 to include states or state agencies, thereby continuing their Eleventh Amendment immunity from monetary liability.

B. Even If the Attorney's Fees Act Is Applicable to the States, the Act Should Not Be Applied Retroactively

Citing *Bradley v. School Board of the City of Richmond*, 416 U.S. 696 (1974), and the legislative history of the Attorney's Fees Act which relied upon it, the court of appeals concluded that this case was a pending case and therefore subject to the provisions of the Act. *Bradley*, however, is clearly distinguishable from the instant case, notwithstanding that the Attorney's Fees Act became law while the case was pending resolution by the court below.

In *Bradley*, this Court construed Section 718 of Title VII of the Emergency School Aid Act, 20 U.S.C. §1617, which granted authority to a federal court to award a reasonable attorney's fee against a local education agency, a state (or any agency thereof) or the United States (or any agency thereof) for violations of Title VI of the Civil Rights Act of 1964 or the Fourteenth Amendment, as they pertain to elementary and secondary education. Because the defendant in that case was a local school board, the Court was not called upon to address the issue of a state's Eleventh Amendment immunity and the propriety of retroactively applying legislation which would have a direct impact on a state's treasury. Consequently, the lower court's reliance upon *Bradley* ignores the fact that the State of Arkansas, unlike a local school board, is protected by the Eleventh Amendment.

Bradley does not stand for the proposition that a congressional enactment shall always be applicable to

pending cases. Rather, the Court predicated its decision upon the principle that:

> ". . . a court is to apply the law in effect at the time it renders its decision, *unless doing so would result in manifest injustice* or there is statutory direction or legislative history to the contrary." 416 U.S. at 711. (Emphasis supplied.)

Although the Eleventh Amendment may be superseded by *proper* congressional action, *Fitzpatrick v. Bitzer, supra,* Congress does not have the plenary and nonreviewable power to thwart the Eleventh Amendment retroactively. This is especially true in the instant case, in which (1) the Attorney's Fees Act does not specifically apply to the states; (2) a state or state agency may not be joined as a defendant on the underlying cause of action, *Fitzpatrick v. Bitzer, supra; Edelman v. Jordan, supra;* and (3) the fiscal consequences are overwhelming.[8] While the protection afforded the states since 1798 by the Eleventh Amendment may now, in some situations, be altered by Congress, justice demands that the states at least be given notice that significant sums must *in the future* be set aside for attorney's fees awards.

This Court has recognized that a major purpose in providing for an award of attorney's fees in civil rights cases is to encourage litigants to bring suits to vindicate the public interest. *See, Newman v. Piggie Park Enterprises, Inc.,* 390 U.S. 400 (1968). As to pending cases, such incentive is unnecessary. Prospective application of the Attorney's Fees Act would accomplish

[8] See remarks of Senator Helms at 122 Cong. Rec. 12432 (September 26, 1976).

this goal while enabling the states to better prepare for the increased financial burden they will bear if they must pay attorney's fees to successful litigants in civil rights actions brought under 42 U.S.C. §1983.

With respect to an individual state official named as a defendant in an action brought under 42 U.S.C. §1983, it is clear that, as previously discussed, retroactive application of the Attorney's Fees Act would not only violate his qualified official immunity, but would also result in a catastrophic financial injustice against an individual who happened to be the nominal state official subjected to suit in accordance with the holding in *Ex Parte Young, supra.* This result surely brings the Attorney's Fees Act within the doctrine that a statute will not be applied retroactively when manifest injustice will result. *Bradley v. School Board of the City of Richmond, supra.*

II. IN THE ABSENCE OF A STATUTORY PROVISION FOR ATTORNEY'S FEES, THE ELEVENTH AMENDMENT REMAINS A BAR TO AN AWARD OF ATTORNEY'S FEES ON THE GROUNDS OF BAD FAITH

As an alternative ground to the Attorney's Fees Act, the court of appeals accepted the district court's determination that an award of attorney's fees was justified in this case because of defendants' bad faith. *Finney v. Hutto,* 548 F.2d at 742, n.6. In *Alyeska Pipeline Service Company v. Wilderness Society,* 421 U.S. 240

(1975), this Court reinforced the traditional "American Rule" that attorney's fees are not ordinarily recoverable by the prevailing litigant in federal litigation absent statutory authority specifically providing for the award of such fees. At the same time, the Court recognized the inherent judicial power to allow attorney's fees in particular circumstances, including the willful disobedience of a court order or actions of the losing party performed "in bad faith, vexatiously, wantonly, or for oppressive reasons." *Alyeska Pipeline Service Co., supra* at 258-59 *(citing F. D. Rich Co., Inc. v. Industrial Lumber Co., Inc.*, 417 U.S. 116, 129 (1974)).

However, in the absence of a statutory provision for attorney's fees, the Eleventh Amendment remains a bar to an award of attorney's fees on the grounds of bad faith. The Court in *Alyeska* specifically declined to reach this issue while noting the split in the decisional law. 421 U.S. at 269, n.44. Moreover, the Court minimized the precedential value of its summary affirmance in *Sims v. Amos*, 340 F. Supp. 691 (M.D. Ala. 1972), *aff'd* 409 U.S. 942 (1972). 421 U.S. at 269, n.46. Given the Court's later summary affirmance in *Murgia v. Commonwealth of Massachusetts Board of Retirement*, 386 F. Supp. 179 (D. Mass. 1974), *aff'd* 421 U.S. 972 (1974), the question of the states' Eleventh Amendment immunity to such fee awards remains an open one.

Prior to the adoption of the Attorney's Fees Act, the various circuit courts of appeals addressed this matter and reached different conclusions based upon different interpretations of this Court's decision in *Edelman*

v. Jordan, supra. The Court of Appeals for the Sixth Circuit, in *Jordan v. Gilligan*, 500 F.2d 701, 705 (6th Cir. 1974), *cert. denied* 421 U.S. 991 (1975), held that the substance and effect of a fee award directed only nominally against state officials "vitally affects the rights and interests of the state in preserving its revenues" and is therefore barred by the Eleventh Amendment.[9] In so holding, that court relied upon the following language in *Edelman*, 415 U.S. at 668, which focused upon the actual source of the funds to be recovered as determinative of the validity of the Eleventh Amendment defense:

> "[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its soverign immunity from suit even though individual officials are nominal defendants." *Edelman v. Jordan, supra* at 663.

This approach to the Eleventh Amendment reflects this Court's repeated recognition of the fundamental state interest in the conduct of its fiscal affairs and the constitutional necessity of strictly limiting federal intrusion into that sensitive area.

Appellate courts in other circuits have arrived at the opposite conclusion, relying upon *Edelman* for the proposition that the award of attorney's fees has a permissible "ancillary effect on the state treasury" resulting from compliance with the award of injunctive re-

---

[9] *Accord, Huecker v. Milburn*, 538 F.2d 1241 (6th Cir. 1976); *Incarcerated Men v. Fair*, 507 F.2d 281 (6th Cir. 1974).

lief.[10] While these courts did not deny that such an award must issue from public funds in the state treasury, they viewed it as having a minimal impact upon state finances, as well as being a necessary incident to the award of injunctive relief.

The latter approach represents an unwillingness by these courts to come to grips with the basic jurisdictional premise underlying the application of the Eleventh Amendment and an attempt to overcome this jurisdictional bar by turning the doctrine of *Ex Parte Young* on its head. In effect, a suit successfully litigated solely against state officials in their official capacities, as in the instant case, would subject the state treasury to an award of attorney's fees notwithstanding that the state is not a party to the action and that the court lacks any jurisdiction over it. Certainly, this Court in *Edelman* did not predicate the recoverability of public funds upon the nominal indentity of the party sued, and indeed, held expressly to the contrary.

Moreover, the justification for any "ancillary effect on the State treasury" in *Edelman* was the necessity of future compliance with federal law, as a result of injunctive relief awarded by a court on the merits. The Court did not, however, consider an award of retroactive benefits, payable out of the state's treasury, nec-

[10] *Souza v. Travisono*, 512 F.2d 1137 (1st Cir. 1975), *vacated on other grounds*, 421 U.S. 983 (1976); *Class v. Norton*, 505 F.2d 123 (2d Cir. 1974); *Thonen v. Jenkins*, 517 F.2d 3 (4th Cir. 1975); *Hallmark Clinic v. North Carolina Dept. of Human Resources*, 519 F.2d 1315 (4th Cir. 1975); *Bond v. Stanton*, 528 F.2d 688 (7th Cir. 1976); *cert. granted*, 426 U.S. 905 (1976), *on remand*, 555 F.2d 172 (1977), *petition for cert. filed* August 18, 1977; *Brandenburger v. Thompson*, 494 F.2d 885 (9th Cir. 1974).

essary to effectuate federal law. *A fortiori*, it does not require that attorney's fees, payable from the same source, be awarded to plaintiffs as a reward for initiating the litigation.

Nor is an award of attorney's fees against the state necessary to contend with obstinate, obdurate litigation practices by defendants or outright bad faith. The inherent power of the court to hold a party in contempt is available in extreme circumstances. In addition, defendant state officials may be subjected to personal liability when they have acted beyond the scope of their discretion and in bad faith. *Scheuer v. Rhodes*, 416 U.S. 232 (1974); *Wood v. Strickland*, 420 U.S. 308 (1975). Naturally, the same breadth of immunity recognized as necessary for executive officials to perform fully and faithfully the duties of their offices must encompass their actions in the course of litigation. Otherwise, defendant state officials, out of concern either for personal liability or the imposition of liability upon the state treasury, might not pursue all appropriate legal means to defend fully those civil rights actions brought against them, to the detriment of the state interests they are duty-bound to represent.

The district court in the case at bar, unable to convincingly distinguish this case from *Alyeska Pipeline Service Co. v. Wilderness Society, supra*, went to considerable lengths to bring it within the "bad faith" exception to the *Alyeska* rule. The court conceded "a continuous albeit erratic course of improvement" in the Arkansas prison system and the initially cooperative attitude of state officials in implementing the court's directives. *Finney v. Hutto*, 410 F. Supp. 251,

284 (E.D. Ark. 1976). Despite some "hardening of Departmental attitudes" and what the court perceived as a lack of initiative by prison officials to uncover other abuses, the court declined to characterize their attitude as uncooperative, let alone obdurate or in bad faith. 410 F. Supp. at 284-85. At worst, the court identified constitutional deficiencies of which high prison officials were ignorant, but "which they eliminated when the facts were disclosed." 410 F. Supp. at 285. This inherent institutional inertia is illustrative of the type of circumstances to which courts must refer in the absence of individual bad faith as a justification for awarding attorney's fees against the state under this exception to the *Alyeska* rule. However, such an award embraces the same concept of punitive retroactive relief prohibited by the Court in *Edelman* under the Eleventh Amendment.

As the late Mr. Justice Black aptly observed in discussing the concept of federalism:

> "The concept [of federalism] does not mean blind deference to 'States' Rights' any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Government, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Younger v. Harris*, 401 U.S. 37, 44 (1971).

See also, National League of Cities v. Usery, 426 U.S. 833 (1976). Considered in this light, an award of attorney's fees payable directly out of a state's treasury is not so essential to the effectuation of federal law that it outweighs the fundamental state interests embodied in the Eleventh Amendment.

Finally, this Court's decision to impose costs upon a state litigant in *Fairmont Creamery Co. v. Minnesota*, 275 U.S. 70 (1927), does not provide authority for awarding attorney's fees, as some lower courts have held. *See, Souza v. Travisono*, 512 F.2d 1137, 1140 (1st Cir. 1975); *Thonen v. Jenkins*, 517 F.2d 37 (4th Cir. 1975); *Skehan v. Bloomsburg State College*, 538 F.2d 53, 58 (3d Cir. 1976). Unlike these cases and the case at bar, *Fairmont Creamery* originated as a criminal prosecution *by* the state and, therefore, technically was not "commenced or prosecuted against" the state as contemplated by the Eleventh Amendment.

Moreover, in *Fairmont Creamery*, costs were found to have been traditionally imposed where judgment was entered against a state, in accordance with Supreme Court rule.[11] Attorney's fees should not be equated with ordinary costs of litigation such as the expense of printing the record. Accordingly, *Fairmont Creamery* is distinguishable from the instant case and does not provide persuasive precedent for overcoming the application of the Eleventh Amendment as a bar to an award of attorney's fees against the state.

---

[11] Rule 57 of the Supreme Court Rules presently governs the award of costs.

III. CONCLUSION

Throughout its decisions in Eleventh Amendment cases, this Court has sought to harmonize the supremacy of the Constitution and federal law with the fundamental independence of the states within the federal system. The Court has been especially sensitive to the potential encroachment on that independence which could result from assertions of federal power over the financial operations of the states. By limiting the scope of federal court rulings, absent statutory authority or state consent to suit, to prospective injunctive relief and avoiding direct impact upon the state treasuries, the Court has successfully preserved both values. The award of attorney's fees against the Arkansas Department of Corrections runs directly counter to the established precedent in this area of the law.

It is respectfully submitted that the decision of the court of appeals affirming the district court's award of attorney's fees should be reversed.

Respectfully submitted,

MELVIN R. SHUSTER
Deputy Attorney General
J. JUSTIN BLEWITT, JR.
Deputy Attorney General
Chief, Civil Litigation

ROBERT P. KANE
Attorney General
Attorneys for the Commonwealth of Pennsylvania, Amicus Curiae